NO. 80-850

FILED
MAR
ALEXANDER
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ELIE JONES, Warden, Stone Mountain Correctional Institution,

Appellant,

v.

BOBBY H. HELMS,

Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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(404) 656-3336

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Counsel for Appellee

APPEAL DOCKETED NOVEMBER 24, 1980
PROBABLE JURISDICTION NOTED
JANUARY 26, 1981

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*Attached as Exhibits to both the Petition for Habeas Corpus and Answer.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

March 23, 1979:

Appellee's petition for a writ of habeas corpus filed in the United States District Court for the Middle District of Georgia, Columbus Division.

April 17, 1979:

Appellant's answer filed.

May 4, 1979:

Memorandum, Order and Judgment for Appellant, denying habeas corpus relief, filed in the United States District Court.

May 24, 1979:

Appellee's Notice of Appeal to the Fifth Circuit Court of Appeals, filed in the United States District Court.

May 24, 1979:

Order filed, by United States District Court Judge J. Robert Elliott, denying Appellee's application for a certificate of probable cause to appeal.

July 6, 1979:

Order filed by United States Circuit Judge Thomas Gibbs Gee, in the United States Court of Appeals for the Fifth Circuit, granting Appellee's application for a certificate of probable cause to appeal.

July 11, 1980:

Judgment entered in the Fifth Circuit Court of Appeals, reversing the United States District Court and remanding for the issuance of habeas corpus relief.

July 25, 1980:
Motion for Rehearing filed in the Fifth Circuit Court of Appeals.

September 3, 1980:
Order filed in the Fifth Circuit Court of Appeals denying the Motion for Rehearing.

September 19, 1980:
Notice of Appeal to the United States Supreme Court filed in the Fifth Circuit Court of Appeals.

November 24, 1980:
Appellant's jurisdictional Statement docketed in the United States Supreme Court.

December 24, 1980:
Appellee's Motion to Affirm filed in the United States Supreme Court.

January 26, 1981:
Order filed in the United States Supreme Court noting probable jurisdiction and granting Appellee's motion for leave to proceed *in forma pauperis*.

STATE OF GEORGIA, COUNTY OF MUSCOGEE:

IN THE SUPERIOR COURT OF SAID COUNTY, FEBRUARY TERM 1976. THE GRAND JURORS selected, chosen and sworn for the county of MUSCOGEE to wit:

I, W. J. Gunby, Foreman

2. C. O. Calhoun
3. ~~W. R. Storey~~
4. James C. McDonald
5. Charles R. Williams
6. Abram Siegal
7. Crawford C. Clinkscales
8. William B. Poovey
9. D. P. Jones
10. Robert E. Safford
11. Charles D. Coleman
12. Dr. William Henry Shaw
13. Jack B. Straus
14. Linda Bryan
15. Jack W. Pope
16. Thomas A. McRae
17. Rosa Parker
18. Samuel C. Bishop
19. James W. Rachels
20. Clarence L. Skinner, Jr.
21. Cathleen R. Hamilton
22.
23.

in the name and behalf of the citizens of Georgia, charge and accuse BOBBY H. HELMS with the offense of:— ABANDONMENT for that said accused, in the county of MUSCOGEE and State of Georgia, did on the 30th day of June, 1974 wilfully and voluntarily abandon his minor legitimate child, to-wit: Angela Sue Helms, age Three (3) years, leaving her in a dependent condition, and the said Bobby H. Helms did leave the State of Georgia,

contrary to the laws of said State, the good order, peace and dignity thereof.

E. MULLINS WHISNANT
District Attorney

Special Presentment

The Defendant Bobby H. Helms, having been arraigned, and having been furnished with a copy of the Indictment and with a list of witnesses on whose testimony the charge against him her is founded, pleads not guilty.

Min 19, Folio 213

/s/ DOUGLAS C. PULLEN District Attorney

/s/ WILLIAM CAIN Deft's Attorney

/s/ BOBBY H. HELMS Defendant

The Defendant _____
waives arraignment and pleads not guilty.

_____ District Attorney

_____ Deft's Attorney

_____ Defendant

36817

Sol's. No. 11 Clerk's No. 142

MUSCOGEE SUPERIOR COURT

P93/26/76

THE STATE

VS.

BOBBY H. HELMS

P. GUILTY MAR 26 1976

ABANDONMENT - 3 yrs. susp. cons
on 2 int. $200/mo. thru, J.P.C.
suspended sentence enforced

E. MULLINS WHISNANT

District Attorney

TRUE BILL

Foreman

Special Presentment

COURT REPORTER

M. Mixon

PLEA OF GUILTY AND WAIVER OF TRIAL BY JURY
OFFICE OF SOLICITOR GENERAL
SUPERIOR COURT—
MUSCOGEE COUNTY, GEORGIA

March 26, 1976

I, Bobby H. Helms, do hereby state that it is my desire and intention to enter a PLEA OF GUILTY to the charge of Abandonment of which I have been accused and charged with having committed on or about the 30th day of June, 1974.

My reason for entering this PLEA OF GUILTY to the above named offense(x) is that I did, in fact, commit the said offense(x). I have been advised by my attorney, whose name appears below, of my constitutional rights which are as follows:

(1) I am entitled to enter a plea of not guilty and to be given a trial by jury;

(2) I am entitled to remain absolutely silent and make no statement at all to any authorities;

(3) I am entitled to have an attorney appointed to defend me if I should elect to plead not guilty and have a trial by jury;

(4) If I cannot afford to hire a lawyer, the court will appoint me an attorney free of charge;

(5) Any PLEA OF GUILTY which is entered by me at this time must be freely and voluntarily made by me and that no promise of any kind can be made to me; and

(6) The nature of the offense of Listed Above has been explained to me by my attorney and the mini-

mum and maximum punishment possible for such offense has been explained to me.

I can read and write, and I have read the above statement which is a PLEA OF GUILTY AND WAIVER OF TRIAL BY JURY and I understand it completely and it is the truth insofar as my guilt of the named charges is concerned and insofar as my understanding my constitutional rights is concerned, SO HELP ME GOD.

SIGNED IN OPEN COURT

BY: /s/ Bobby H. Helms
Defendant—charged with the offense(x) of Abandonment

BY: /s/ William Cain
Attorney for defendant—who is court appointed for purposes of advising defendant of his (xxx) constitutional rights prior to defendant entering a PLEA OF GUILTY to the above named charge(x)

BY: /s/ Douglas C. Pullen
Solicitor General,
Superior Court
Muscogee County, Georgia

GEORGIA, MUSCOGEE COUNTY:

IN MUSCOGEE SUPERIOR COURT

THE STATE vs BOBBY H. HELMS	FEBRUARY Term, 1976 ABANDONMENT NO 36817 and PLEA of guilty.

WHEREUPON, it is ordered and adjudged by the Court that the Defendant BOBBY H. HELMS be taken from the bar of this Court to the jail of Muscogee County, and be there safely kept until a sufficient guard is sent for him from the Georgia Penitentiary, and be then delivered to, and be by said guard taken to said Penitentiary, or such place as the Director of Corrections may direct, where he, the said defendant be confined at labor for the full term of not less than three years, to be suspended, so long as and on the conditions that he pay to the Adult Probation Officer of said County, the sum of Two Hundred ($200.00) each month commencing May 1, 1976, and payable each and every month during the minority of the Defendant's minor child, to-wit, Angela Sue Helms, to be used in the support and maintenance of said child.

This the 26th day of March, 1976.

Min 19 Folio 214

/s/ JOHN H. LAND
Judge Superior Court

GEORGIA MUSCOGEE COUNTY

CLERK'S OFFICE SUPERIOR COURT

I Kathleen Massengale DEPUTY CLERK OF THE SUPERIOR COURT OF MUSCOGEE COUNTY, GEORGIA, SAID COURT BEING A COURT OF RECORD IN AND FOR SAID COUNTY, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF Ind, Plea, & Sentence, and Order Enforcing Suspended Sentence, HAD IN THE CASE OF The State vs. Bobby H. Helms AS OF FILE AND RECORD IN SAID OFFICE.

GIVEN UNDER MY HAND, WITH THE SEAL OF SAID COURT AFFIXED THIS 8th DAY OF December, 1978.

/s/ KATHLEEN MASSENGALE

[SEAL]

DEPUTY CLERK,
SUPERIOR COURT
MUSCOGEE COUNTY,
GEORGIA

GEORGIA, MUSCOGEE COUNTY THE STATE OF GEORGIA VS. BOBBY H. HELMS	IN MUSCOGEE SUPERIOR COURT JUNE TERM 1978 ABANDONMENT NO. 36817 AND PLEA OF GUILTY

ORDER ENFORCING SUSPENDED SENTENCE

On March 26, 1976, in said Court, for the offense set out above, the defendant, Bobby H. Helms was sentenced to serve three years in the Georgia Penitentiary, under the jurisdiction of the State Board of Corrections. However, it was provided that said sentence stand suspended on the conditions that he pay to the Adult Probation Officer of Muscogee County the sum of two hundred dollars ($200.00) per month commencing May 1, 1976, and payable each and every month during the minority of the defendant's minor child, to-wit, Angela Sue Helms, to be used in the support and maintenance of said minor child.

Now, on this day, at a hearing to determine whether the defendant, Bobby H. Helms has violated the conditions of said suspended sentence, and after hearing evidence in the matter, it appears to the Court that the defendant has violated the conditions of said suspended sentence.

WHEREUPON, it is ordered and adjudged by the Court that the defendant, Bobby H. Helms be required to serve said three-year sentence within the confines of the Georgia Penitentiary, under the jurisdiction of the State Board of Corrections, to be computed according to law.

This the 9th day of June, 1978.

COURT REPORTER
/s/ M. Mixon

/s/ John H. Land
JUDGE,
MUSCOGEE COUNTY
SUPERIOR COURT

DATE_____

Min 22, Folio 594

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

[Filed DeKalb Co. Ga., Jan. 9, 2:49 P.M., '79;
Chandler Bridges, Clerk, Superior Court.]

BOBBY H. HELMS, *Petitioner,* v. ELIE JONES, WARDEN STONE MOUNTAIN CORRECTIONAL INSTITUTE, *Respondent.*	CIVIL ACTION NO. 9510 HABEAS CORPUS

ORDER

The above-captioned matter having come before this Court for a hearing on December 13, 1978, and after hearing oral testimony and considering documentary evidence submitted in this case, this Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

On March 26, 1976, Petitioner pled guilty in the Superior Court of Muscogee County to the offense of child abandonment. On the same date he was sentenced to three years imprisonment, such sentence being suspended on the condition Petitioner pay $200.00 per month for the support and maintenance of his child during her minority. On June 9, 1978, the Superior Court of Muscogee County found that Petitioner violated the conditions of said suspended sentence and consequently revoked the same.

Petitioner filed this action on November 21, 1978, seeking relief under *habeas corpus*. The only issue raised in his petition challenges the constitutionality of Ga. Code Ann. § 74-9902, Georgia's child abandonment statute. Peti-

tioner asserts that the wording of a portion of the statute violates the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution.

At the hearing conducted on December 13, 1978, Petitioner testified in his own behalf and was represented by counsel, Attorney James Bonner of the Prisoner Legal Counseling Project. Both parties also submitted brief memoranda in support of their positions.

CONCLUSIONS OF LAW

The challenged portion of Ga. Code Ann. § 74-9902 reads as follows:

> "If any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, he or she, as the case may be, shall be guilty of a misdemeanor: Provided, however, if any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, and shall leave this State, or if any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, after leaving this State, he or she, as the case may be, shall be guilty of a felony and shall, upon conviction, be imprisoned in the penitentiary for not less than one nor more than three years, which shall be reducible to a misdemeanor."

Although the Equal Protection Clause prohibits the State from arbitrarily discriminating among persons within its jurisdiction, some differences in treatment are permissible if the object of the state action can be rationally justified. Furthermore, there is a presumption in favor of the constitutionality of state statutes and a statutory

discrimination will not be set aside if any statement of facts may be conceived to justify it. *McGowan v. Maryland*, 366 U.S. 420, 425, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). Absent invidious discrimination a rationally based classification does not run afoul of the clause. *Massachusetts Board of Retirement v. Muriga*, 427 U.S. 207, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).

Likewise, the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution bars discrimination against citizens of other states where there is no substantial reason for the discrimination except for the fact that they are citizens of other states. *See, Slaughter-House Cases*, 16 Wall 36, 21 L.Ed. 394 (1872). However, the constitutional provision does not necessarily bar all disparity in treatment in cases where there are perfectly valid independent reasons for it. This was recognized in *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1157, 92 L.Ed. 1460 (1947), *reh. den.* 335 U.S. 837 (1948) where the Supreme Court stated:

> "[T]he inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the states should have considerable leeway in analyzing local evils and prescribing appropriate cures." *Toomer* at p. 396

In balancing the State interests served by the statute against the disparity of treatment imposed upon the Petitioner, this Court concludes that the State interests should prevail.

The State has an inherent interest in promoting the parental care and support of minor dependent children within the state, and in providing an inexpensive, speedy

means to require that support. It becomes much easier to avoid the obligations of child support and escape prosecution for such when one leaves the State and removes himself from State jurisdiction. The more cumbersome process of extradition must then be utilized resulting in increased difficulty in the enforcement of Code § 74-9902.

The increased penalty is imposed under the statutory provision on two classes of individuals: (1) those who have abandoned their children and who have left the state, and (2) those who have left the state and who then choose to wilfully and voluntarily abandon their children. The increased penalty promotes the protection of minor dependent children by discouraging those who are in the first group from evading their parental obligations by fleeing the state. Thus, they are more apt to remain subject to State jurisdiction, and State interests can more easily be served. The statute discourages those who are in the second classification from abandoning their children once they have left the State's jurisdiction and have diminished the opportunity for enforcement of the support obligations. For this class of individuals the statute does not discourage interstate movement, but does discourage the abandonment of dependent minors by those who have increased the likelihood of successfully evading their support obligations by leaving the State's jurisdiction.

Lastly the State has an interest in protecting its fiscal reserves from the financial burden of supporting children whose parents have abandoned them.

The aforementioned State interests are sufficient to overcome Petitioner's claims that his rights under the Equal Protection Clause of the Fourteenth Amendment and under the Privileges and Immunities Clause of Ar-

ticle IV, § 2 of the United States Constitution have been violated.

Thus, based on the findings of fact contained in this Order, and after considering all evidence and testimony presented, this Court concludes that none of Petitioner's constitutional rights have been violated and that all of his allegations are without merit.

It is thus ORDERED and ADJUDGED that Petitioner be remanded to the custody of the Respondent, Warden for the service of the remainder of the sentence challenged in this proceeding.

SO ORDERED, this 8th day of January, 1978.

/s/ CURTIS V. TILLMAN

CURTIS TILLMAN
Superior Court Judge
Stone Mountain Judicial Circuit

IN THE DEKALB SUPERIOR COURT
STATE OF GEORGIA

BOBBY H. HELMS,
Petitioner,
VS.
ELIE JONES, WARDEN,
Respondent.

CIVIL NO. _____

STIPULATION OF FACTS

On March 15, 1969, Petitioner, Bobby H. Helms, while serving in the Army and stationed in Columbus, Georgia, married Sylvia Smith. Shortly thereafter he served a tour of duty in Vietnan (sic) and returned to Georgia in July of 1970 and acquired some property. On May 11, 1972, a daughter, Angela Sue Helms, was born to the couple. The Petitioner's wife also had custody of two other children by a former marriage.

The family lived in Georgia until August of 1973 when he was transferred to Germany. His wife and the children accompanied him there. However, marital difficulties broke out and in November of 1974 his wife and children returned to Georgia. After his discharge from the Army in June, 1975, the Petitioner also returned to Georgia where he enrolled in a vocational training program. The couple remained separated.

That summer the Petitioner's wife filed for separation and the Petitioner was directed to pay $150.00 per month as child support. Without making such payments, the Petitioner, who by then had lost his property in Georgia, left the State and moved back to his native State, Alabama. He testified that he did not do so in order to avoid his domestic obligations but because certain vocational training opportunities, for which he was ineligible in Co-

lumbus, were available to him under VA there.

He remained in Alabama until February, 1976. Unbeknown to Petitioner, his estranged wife had secured a warrant for his arrest because of his continuous failure to pay child support. On February 13, 1976, while visiting his child in Columbus, he was arrested.

The grand jury of Muscogee County, in a special presentment returned on March 19, 1976, formally charged him with the felony of abandoning his child and leaving the State. The Petitioner pleaded guilty in the Superior Court on March 26, 1976, and was sentenced to a three-year suspended sentence conditioned on his paying $200.00 per month as child support. Upon his realease (sic), he returned to Ozark, Alabama, but when he failed to make support payments under the court order a bench warrant was issued for his arrest.

The Petitioner next moved to South Florida and took up residence in the Fort Lauderdale area. On February 17, 1977, his estranged wife was murdered in Columbus by her third husband. Shortly thereafter, temporary custody of all of her three children, including Angela Sue, was given to her first husband who brought them to his home in Tallahassee, Florida. There the Petitioner brought an action in the juvenile court seeking custody of his own child, proceedings which were complicated by Georgia's contemporaneous efforts to have him extradited to Columbus on a probation violation warrant for child abandoment. He was finally successful in gaining custody of his child on April 27, 1977, but only after the juvenile court judge had received assurances from the Florida Governor's office that he would not be extradited back to Georgia under the circumstances.

The Petitioner remained in Florida until January of 1978, when he decided to move to Augusta, Georgia.[1]

On January 21, 1978, the Georgia Department of Family and Children Services in Augusta received a letter from the Florida Department of Health and Rehabilitation Services which alerted them to the Petitioner's arrival in Augusta. The letter was prompted by an incident which occurred in a Greyhound bus station in Jacksonville, Florida. According to the Florida authorities, the Petitioner had been arrested for public drunkenness and was observed striking his child. His daughter had been taken to an emergency shelter but was later returned to him after an informal hearing in Jacksonville. Because of this incident and other alleged incidents of child abuse and neglect which had been reported in Florida, the Florida caseworkers had become concerned about Angela Sue's welfare, and when they learned that he was taking her to Augusta they forewarned the Georgia authorities.

Upon investigating the Petitioner's activities in Augusta, the Georgia Department of Family and Children Services initially received satisfactory information. However, a short time later they received reports that the Petitioner had a drinking problem which threatened the safety and well-being of his daughter. After further in-

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[1] Concerned over a case in which the parent was confined for abandoning a child whom he later assumed custody of, the court below adjourned the evidentiary hearing in order that the Respondent could investigate the facts further. The following paragraphs indicate what his proof would have been. However, because of the dubious relevance of the entire factual background to the specific constitutional issue raised, and because the court was satisfied that no miscarriage of justice had necessarily occurred, the court and the parties' counsel agreed that no further hearing would be necessary and that the parties could simply stipulate what the State's rebuttal evidence would have indicated.

vestigation and further complaints, they acted to secure an emergency court order by which they assumed custody of Angela Sue. They also learned around this time of the outstanding warrant in Muscogee County. He was arrested under it, transported back to Columbus, and sentenced to serve three years after a June 9, 1978 hearing in which his suspended sentence was revoked.

Angela Sue has been placed with a relative and is living in Columbus, Georgia.

Thereafter, on November 21, 1978, the Petitioner filed this action in the DeKalb Superior Court seeking a writ of habeas corpus.

/s/ JAMES C. BONNER, JR. (2/9/79)

JAMES C. BONNER, JR.
Counsel for the Petitioner

/s/ NICHOLAS G. DUMICH 2-9-79

NICHOLAS G. DUMICH
Assistant Attorney General
Counsel for the Respondent

CURTIS V. TILLMAN
Judge, Stone Mountain Judicial Circuit

Application No. 884

SUPREME COURT OF GEORGIA

ATLANTA, February 27, 1979

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

BOBBY H. HELMS V. ELIE JONES, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,
CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

JOLINE B. WILLIAMS, Clerk.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

[Filed at 10:45 A.M., Mar. 23, 1979,
Jonnie L. Adams, Deputy Clerk, U.S. District Court,
MIDDLE DISTRICT OF GEORGIA]

BOBBY H. HELMS,
Petitioner,
vs.
WARDEN ELIE JONES,
Respondent.

Civil No. 79-36-Col.

PETITION FOR A WRIT OF HABEAS CORPUS

Bobby H. Helms, by counsel, respectfully petitions this court on the following basis for a writ of habeas corpus directed to the Respondent.*

A. The Respondent is the Warden of the Stone Mountain Correctional Institution, Stone Mountain, Georgia.

B. There, he is holding the Petitioner under [3] a three-year sentence which [1] the Muscogee Superior Court imposed upon him on [2] 26 March 1976 following his [5, 6] plea of guilty to an indictment for [4] felony child abandonment, that is, abandoning his child and leaving the State (Georgia Code Ann. 74-9902 [1978 Supp.]).

C. The sentence was originally suspended on condition that the Petitioner make certain child support payments. When he failed to do so, the trail (sic) court ordered the suspension revoked on 9 June 1978.

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*The bracketed numerals below and the materials immediately following them correspond to the paragraphs of the model form approved for use in this District. For clarity, some of the model's paragraphs have been somewhat rearranged and combined.

D. Accurate copies of the indictment, plea, suspended sentence, and order of revocation are attached as Exhibits A, B, C, and D.

E. [8-10] The Petitioner took no direct appeal from these proceedings. [10-11(a)(3)] However, in November 1978, he sought a State writ of habeas corpus in the Dekalb Superior Court claiming that "the statute under which [he] was charged, convicted, and sentenced . . . (Code Ann. 74-9902), insofar as it permits a difference in penal treatment which turns solely upon exercise of the constitutionally securred (sic) right to travel and to reside outside of the State, is unconstitutional as a violation of both the Equal Protection Clause of the 14th Amendment and the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution of the United States."

F. [11(a)(4-6)] Following an evidentiary hearing (See Exhibit E, an accurate copy of the parties' stipulation of the evidence), on 8 January 1979, the Dekalb Superior Court denied relief, sustained the statute, and ordered the Petitioner remanded to custody. An accurate copy of its order is attached as Exhibit F.

G. [11(d)] The Petitioner sought to appeal to the Supreme Court of Georgia but it declined to entertain the case. Exhibit G is an accurate copy of its order declining to grant a certificate of probable cause.

H. Georgia Code Ann. 74-9902 (Georgia Laws 1965, p. 197, as amended) which provides for increased penalties and felony treatment if an accused has exercised his right to travel interstate and to reside outside of Georgia, without reference to any specific intent or purpose of avoiding his child support obligations, by its overbreadth offends the Equal Protection Clause of the 14th Amendment.

I. The penalty scheme created by Georgia Code Ann. 74-9902 impermissibly discriminates against citizens of other States by branding them as felons simply because they live and reside outside of Georgia, regardless of whether they have innocently exercised their rights to do so, and thus it violates the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution.

WHEREFORE the Petitioner respectfully requests that this court direct the Respondent to answer this petition, issue the writ, and order that he be discharged or afforded such further relief as law and justice require.

/s/ JAMES C. BONNER, JR.

JAMES C. BONNER, JR.
Counsel for the Petitioner

UNIVERSITY OF GEORGIA SCHOOL OF LAW
LEGAL AID AND DEFENDER SOCIETY
PRISONER LEGAL COUNSELING PROJECT
475 North Lumpkin Street
Athens, Georgia 30601

(404) 542-4241

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

[Filed at 8:20 A.M., Apr. 17, 1979,
Jonnie L. Adams, Deputy Clerk, U.S. District Court,
MIDDLE DISTRICT OF GEORGIA]

BOBBY H. HELMS,
Petitioner,
v.
WARDEN ELIE JONES,
Respondent.

CIVIL ACTION
NO. 79-36-COL.

ANSWER AND RESPONSE

COMES NOW, Elie Jones, Respondent in the above-styled action, by and through the Attorney General for the State of Georgia, who makes this Answer and Response to the habeas corpus petition of Bobby H. Helms.

1.

Petitioner is presently serving a three-year sentence for the offense of child abandonment, which was originally imposed by the Superior Court of Muscogee County, Georgia on March 26, 1976, pursuant to Petitioner's guilty plea. Petitioner's sentence was suspended on the condition that he pay $200.00 per month for the support and maintenance of his child during her minority. On June 9, 1978, said Superior Court of Muscogee County found that Petitioner violated the conditions of said suspended sentence and consequently revoked the same. (Copies of Petitioner's indictment, guilty plea, sentence and order enforcing the revocation of his suspended sentence are attached as Exhibit A).

2.

On November 21, 1978, Petitioner filed an action seeking relief under habeas corpus in the DeKalb County Superior Court. By that action Petitioner challenged the constitutionality of Ga. Code Ann. § 74-9902, Georgia's child abandonment statute.

3.

Following an evidentiary hearing, the DeKalb County Superior Court denied relief and ordered the Petitioner remanded to custody. (A copy of the DeKalb Superior Court's order is attached as Exhibit B).

4.

Petitioner's application to the Supreme Court of Georgia for review of the trial court's habeas corpus ruling was denied. (Exhibit C).

5.

Petitioner then filed, on March 23, 1979, a petition for a writ of habeas corpus in this Court.

EXHAUSTION

6.

Respondent admits that the allegations raised in Petitioner's application for habeas corpus relief were also raised by Petitioner in his petition filed in the Superior Court of DeKalb County in November of 1978. Said petition being denied in the Superior Court, and later application for review by the Supreme Court of Georgia also being denied, it thus appears that Petitioner has exhausted all of his available state remedies.

EXHIBITS AVAILABLE

7.

The following exhibits are attached in support of this Answer and Response: (1) Respondent's Exhibit A—a copy of Petitioner's indictment, guilty plea, suspended sentence and revocation of his suspended sentence; (2) Respondent's Exhibit B—a copy of the order of the DeKalb County Superior Court denying habeas corpus relief; (3) Exhibit C—a copy of the Supreme Court of Georgia's denial of Petitioner's application for a certificate of probable cause to appeal; Respondent's Exhibit D—a copy of the agreed upon stipulation of facts which were before the DeKalb County Superior Court.

ANSWERING PARTICULARLY THE ALLEGATIONS OF THE PETITION:

8a.

Respondent denies those allegations listed in the petition which assert that Ga. Code Ann. § 74-9902 (Ga. Laws 1965, p. 197, as amended) unconstitutionally impinges on Petitioner's right to interstate travel, and additionally denies that said statute violates the equal protection clause of the Fourteenth Amendment.

8b.

Respondent denies that Ga. Code Ann. § 74-9902 violates the privileges and immunities clause of Art. IV, Sec. II of the United States Constitution.

SEPARATE DEFENSE

9.

Respondent asserts that the petition for writ of habeas corpus filed by Bobby H. Helms, fails to state a claim upon which relief can be granted.

WHEREFORE, because an examination of the challenged Georgia statute, Ga. Code Ann. § 74-9902, reveals that said statute does not deny Petitioner any of his constitutional rights, this Court should deny Petitioner an evidentiary hearing, and should dismiss this instant petition for a writ of habeas corpus as being without merit.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

/s/ DON A. LANGHAM
DON A. LANGHAM
First Assistant
Attorney General

/s/ JOHN C. WALDEN
JOHN C. WALDEN
Senior Assistant
Attorney General

/s/ NICHOLAS G. DUMICH
NICHOLAS G. DUMICH
Staff Assistant
Attorney General

Please serve:

NICHOLAS G. DUMICH
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3499

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

[Filed at 10:50 A.M., May 4, 1979,
Jonnie L. Adams, Deputy Clerk, U.S. District Court,
MIDDLE DISTRICT OF GEORGIA]

BOBBY H. HELMS, *Petitioner,* v. WARDEN ELIE JONES, *Respondent.*	CIVIL ACTION NO. 79-36-COL

MEMORANDUM AND ORDER

The Petitioner in this habeas corpus application is serving a three year sentence for the offense of child abandonment which was imposed by the Superior Court of Muscogee County, Georgia pursuant to Petitioner's guilty plea. In November, 1978 Petitioner filed an action seeking habeas corpus relief in the DeKalb County Superior Court in which Petitioner challenged the constitutionality of §74-9902 of the Georgia Code Annotated, this being Georgia's child abandonment statute. Following an evidentiary hearing the DeKalb County Superior Court denied relief and Petitioner's application to the Supreme Court of Georgia for review of the trial court's ruling was denied. The Petitioner then filed a petition for the writ of habeas corpus in this Court and in this proceeding he makes the same contentions made in the state court.

There is no controversy concerning the pertinent facts. The only question presented is a legal one. Upon consideration, this Court determines that the Georgia statute referred to is not unconstitutional for any of the reasons urged by the Petitioner and that Petitioner's rights were

not violated under the equal protection clause of the Fourteenth Amendment or under Article IV, Section II, of the United States Constitution. No evidentiary hearing is indicated and it is directed that the pending petition for the writ be dismissed as being without merit.

IT IS SO ORDERED this 4th day of May, 1979.

J. ROBERT ELLIOTT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

[Filed at 11:55 A.M., May 4, 1979,
Jonnie L. Adams, Deputy Clerk, U.S. District Court,
MIDDLE DISTRICT OF GEORGIA]

BOBBY H. HELMS, *Petitioner,* v. WARDEN ELIE JONES, *Respondent.*	CIVIL ACTION NO. 79-36-COL.

JUDGMENT

Pursuant the Memorandum and Order of this Court dated May 4, 1979, and for the reasons stated therein, the petition for writ of habeas corpus is denied, and

JUDGMENT IS THEREFORE ENTERED IN FAVOR OF THE RESPONDENT.

This 4th day of May, 1979.

WALTER F. DOYLE, CLERK

By /s/ JONNIE L. ADAMS
JONNIE L. ADAMS
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

[Filed at 1:10 P.M., May 24, 1979,
Jonnie L. Adams, Deputy Clerk, U.S. District Court,
MIDDLE DISTRICT OF GEORGIA]

BOBBY H. HELMS, *Petitioner*, vs. WARDEN ELIE JONES, *Respondent.*	CIVIL NO. 79-36-COL

NOTICE OF APPEAL

Bobby H. Helms, by counsel, hereby respectfully gives notice of his appeal from the final order and judgment entered herein on 4 May 1979 dismissing his petition under 28 U.S.C. 2254.

The Clerk will please submit this to the District Court for consideration of a certificate of probable cause pursuant to Rule 22(b), F.R.A.P., and transmit the entire record (which consists only of the pleadings and the final order) to the Clerk of the Fifth Circuit Court of Appeals.

This 21st day of May, 1979.

/s/ JAMES C. BONNER, JR.

JAMES C. BONNER, JR.
Counsel for the Petitioner

UNIVERSITY OF GEORGIA SCHOOL OF LAW
LEGAL AID AND DEFENDER SOCIETY
PRISONER LEGAL COUNSELING PROJECT
475 North Lumpkin Street
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(404) 542-4241

Bobby H. HELMS,
Petitioner-Appellant,
v.
Elie JONES, Warden,
Respondent-Appellee.
No. 79-2596.

United States Court of Appeals,
Fifth Circuit.
July 11, 1980.

James C. Bonner, Jr., Athens, Ga., for petitioner-appellant.

Nicholas G. Dumich, Asst. Atty. Gen., Atlanta, Ga., for respondent-appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before INGRAHAM, RONEY and THOMAS A. CLARK, Circuit Judges.

THOMAS A. CLARK, Circuit Judge:

The appellant, unable to meet his child support obligations, left the State of Georgia in search of vocational training opportunities.[1] He was subsequently convicted of child abandonment under Ga.Code Ann. § 74-9902 [1979 Supp.] and sentenced to three years' imprisonment. After exhausting state remedies he filed a petition for habeas corpus under 28 U.S.C. § 2254,[2] which was denied.

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[1] Stipulation of Facts, Record at 7.

[2] The appellant's discharge from custody during the pendency of this appeal does not moot his claim. *Carafas v. LaValle*, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968).

On appeal he attacks the constitutionality of the statute. We think the petition should have been granted and reverse.

In essence, the statute[3] makes the crime of child abandonment a misdemeanor if the offense occurs in Georgia, while making the same crime a felony if the abandoning parent leaves the State of Georgia or abandons the child after leaving the State. The statute thus creates two classes of crimes, the first a misdemeanor for child abandonment within the State, the second a felony for leaving the State after abandonment or abandonment after leaving the State. Those outside Georgia, merely by their presence outside the State, are exposed to risk of a felony conviction while Georgia residents are exposed only to risk of a misdemeanor conviction for the same actions. We find the fundamental right to travel[4] is infringed by this classification system.

Employing "traditional" equal protection analysis, we are required to scrutinize strictly statutes which impermissibly interfere with the exercise of fundamental rights. Strict scrutiny requires a state to have a compelling interest which outweighs the infringement.[5]

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[3] Ga.Code Ann. § 74-9902 [1979 Supp.] provides:

> If any father or mother shall wilfully and voluntarily abandon his or her child . . . leaving it in a dependent condition, he or she shall be guilty of a misdemeanor. Provided, however, if any father or mother shall wilfully and voluntarily abandon his or her child . . . leaving it in a dependent condition and shall leave this State, or if any father or mother shall wilfully and voluntarily abandon his or her child . . . leaving it in a dependent condition, after leaving this State, he or she . . . shall be guilty of a felony . . .

[4] *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); and *U. S. v. Guest*, 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966).

[5] *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1972).

Georgia argues that the compelling state interests here are (1) the greater ease in extraditing persons accused of felonies than those accused of misdemeanors and (2) the protection of the State's fiscal integrity by the resulting enforcement of required parental child support. These arguments are unpersuasive since Georgia has in place, through its adoption of the Uniform Reciprocal Enforcement of Support Act (URESA), Ga.Code Ann. § 99-9A, et seq.,[6] an alternative means of enforcing child support obligations. Fiscal integrity of the State, support of minor children, and extradition of the nonpaying parent are all protected by this Act.[7]

We therefore find no sufficiently compelling state interest here which permits distinguishing between nonsupporting parents within or without the State of Georgia. There is no question that the statute violates equal protection. Further, even where a governmental purpose is legitimate, as here, the "purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." [8] Again, URESA provides a less drastic means of achieving the ends sought by this overly broad statute.

The failure of the statute to require criminal intent as an element necessary for conviction is further indication of its overbreadth. Under the provision a person leaving

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[6] *See specifically* § 99-906a providing for interstate extradition.

[7] The State's compelling interest argument further loses force by the failure of the State actively to enforce this statute. At oral argument appellee's counsel stated that he knew of no other prosecutions, while appellant's counsel knew of only three. Thus, the State has made only broadly conclusory statements about the necessity for this statute as part of a concerted attempt to solve a major state problem.

[8] *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231, 237 (1960).

the State fully intending to support his or her children, but unable to do so, commits a felony. A series of non-criminal acts can thus become a crime under the statute, subjecting the nonresident to extradition and felony conviction.[9] The advisability of a specific intent in statutes prohibiting the fundamental right to travel is illustrated by comparison to the federal "flight to avoid prosecution or giving testimony" statute, 18 U.S.C. § 1073. In examining the requisite elements for a conviction of that offense, where the statute itself requires intent, we have observed that "the gravamen of the offense charged . . . is that the defendant fled a state with *intent* to avoid prosecution therein, and *mere absence from the state* of prosecution, though it renders one a fugitive from justice for interstate rendition [citation omitted] is not sufficient proof of a federal crime." [10] (Emphasis supplied)

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[9] While we recognize that certain regulatory offenses do not require scienter or a criminal state of mind and that the criteria for distinguishing between crimes that require a mental element and those that do not are elusive, we decline to find the "crime" of crossing state lines as the type of "public welfare" statute which dispenses with *mens rea* as an element of the offense. *See generally, Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), and authorities cited therein.

[10] *Barrow v. Owen*, 89 F.2d 476, 478 (5th Cir. 1937).

See Ark.Rev.Stat.Ann. § 41-2405 (1975) for an example of a non-support statute which provides for specific intent. It creates a misdemeanor for failure to provide support, except if "the person leaves or remains without the State of Arkansas *with purpose to avoid a legal duty* to provide support to another person . . ." (emphasis supplied), then the offense is a felony. The official comments to this statute are instructive. They state:

> Prior law apparently imposed felony liability merely upon a showing that the defendant left the state. The difficulty in apprehending a defendant is not a relevant grading criterion in the case of any other offense, and nonsupport should not be an exception. In addition, the Commission was concerned with the fact that in an increasingly mobile society people often leave the state for reasons completely unrelated to possible support obligations . . .

Accordingly, we REVERSE and REMAND for the issuance of the writ.[11]

We, of course, do not rule here on the constitutionality of Arkansas' statute, but merely find its approach of assistance on this point.

See also, In Re King, 3 Cal.3d 226, 90 Cal. Rptr. 15, 474 P.2d 983 (1970), where the California Supreme Court found a statute similar to Georgia's constitutionally defective.

[11] In preparing this opinion we learned first through LEXIS and then from the Georgia Attorney General's office that the Georgia Supreme Court decided on February 26, 1980, that in its view the questioned Georgia statute is constitutional. *See Garren v. The State*, 245 Ga. 323, 264 S.E.2d 876 (1980). There the court was faced with one who had already been charged with abandonment before leaving the State. There is no discussion of intent and whether the State proved that the defendant left Georgia with intent to avoid prosecution and intent not to support his children. Thus, the facts in *Garren* may reflect that he was fleeing with intent to avoid prosecution and payment of child support. Absent intent, the statute permits conviction of an innocent person contrary to the common law requirement of a culpable state of mind as an ingredient of a criminal offense. The history and reasons for this element being an essentiality of a criminal act are eloquently described by Justice Jackson in *Morissette, supra* note 9. The Georgia court's decision does not alter our opinion in this case. We cannot concur with the notion that *mere* presence in another state can make the same actions a felony that are a misdemeanor in Georgia—this is a denial of equal protection and an impermissible limitation on travel.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-2596

[U. S. Court of Appeals, Filed Sep. 3, 1980,
Gilbert F. Ganucheau, Clerk]

BOBBY H. HELMS,
Petitioner-Appellant,

versus

ELIE JONES, Warden,
Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Georgia

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ON PETITION FOR REHEARING

(SEPTEMBER 3, 1980)

Before INGRAHAM, RONEY and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ THOMAS A. CLARK
United States Circuit Judge

Form 703-2

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 79-2596

BOBBY H. HELMS,
Petitioner-Appellant,

v.

ELIE JONES, WARDEN,
Respondent-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Elie Jones, the Respondent-Appellee above-named, hereby appeals to the Supreme Court of the United States, from the July 11, 1980, order of the United States Court of Appeals for the Fifth Circuit, which reverses the decision of the United States District Court for the Middle District of Georgia, Columbus Division, and which holds that the felony provision of Ga. Code Ann. § 74-9902 [1979 Supp.] is unconstitutional as being in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

This appeal is taken pursuant to 28 U.S.C. § 1254(b).

Respectfully submitted,

Please serve:

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/s/ JOHN C. WALDEN
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Attorney General

/s/ NICHOLAS G. DUMICH
NICHOLAS G. DUMICH
Assistant Attorney General

*(Certificate of Service omitted in printing.)

SUPREME COURT OF THE UNITED STATES

No. 80-850

Elie Jones, Warden, Stone Mountain Correctional Institution,

Appellant,

v.

Bobby H. Helms

APPEAL from the United States Court of Appeals for the Fifth Circuit.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

January 26, 1981

CERTIFICATE OF SERVICE

I, CAROL ATHA COSGROVE, one of the attorneys for the Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served opposing counsel in this action with three copies of the foregoing Appendix, by depositing three copies of the same in the United States Mail, with first class postage prepaid, addressed as follows:

James C. Bonner, Jr.
Prisoner Legal Counseling Project
University of Georgia
School of Law
475 North Lumpkin Street
Athens, Georgia 30601

CAROL ATHA COSGROVE
Assistant Attorney General

This ____ day of March, 1981.